Office-Supreme Court, U.S.
FILED
NOV 28 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-374

# In the Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT FLANAGAN, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE UNITED STATES

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## QUESTION PRESENTED

Whether the district court abused its discretion when it disqualified a single law firm from representing all four petitioners.

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## BRIEF FOR THE UNITED STATES

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. A2-A11) is reported at 679 F.2d 1072.

### JURISDICTION

The judgment of the court of appeals was entered on June 2, 1982 (Pet. App. A32-A33), and a petition for rehearing was denied on July 12, 1982 (Pet. App. A34-A35). The petition for a writ of certiorari was filed on September 1, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. Petitioners are police officers in the Philadelphia Police Department, where they were members of a so-called "grandpop" squad. The squad focused on apprehending street criminals using petitioner Flanagan, disguised to

appear infirm or aged, as a decoy. The other three petitioners served as a back-up team that responded upon hearing a prearranged signal from petitioner Flanagan (Pet. App. A13).

On September 10, 1981, a grand jury sitting in the Eastern District of Pennsylvania indicted petitioners in a 13-count indictment. The indictment charged all petitioners in Count 1 with conspiring to violate the civil rights of citizens, in violation of 18 U.S.C. 241. The succeeding counts charged petitioners, in varying combinations, with substantive civil rights offenses in violation of 18 U.S.C. 242 (Pet. App. A4). The indictment alleged that in the course of their activities on the grandpop squad, petitioners had conspired to arrest persons without probable cause and had illegally arrested or physically abused eight people (Pet. App. A13).

2. During the grand jury's investigation, petitioners had retained the firm of Sprague & Rubenstone to represent them (Pet. App. A4). On October 20, 1981, after the indictment was returned, the government moved under Fed. R. Crim. P. 44(c) for a hearing to inquire into the joint representation of all four petitioners by one law firm.

After the hearing and submission of briefs, the district court ordered the law firm of Sprague and Rubenstone disqualified from representing any of the petitioners. The court found that "a conflict of interest was very likely to arise in the course of the proceedings against [petitioners]," observing that to reach this conclusion "one need not look beyond the indictment and the numerous pretrial motions, together with supporting memoranda of law, filed by defense counsel" (Pet App. A16).[1]

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[1]Similarly, the court stated at the hearing (Pet. App. A40): "The potential for conflict just jumps out in this case and I just don't know how counsel could even undertake, under the circumstances, to attempt to represent all four of these defendants." See also *id.* at A55, A59, A68.

The court first noted that all four petitioners were not charged in each count of the indictment,[2] reflecting that the involvement of each "may vary significantly from that of the others" (Pet. App. A16-A17). Indeed, the court observed, petitioners had moved to dismiss Count One of the indictment, the conspiracy count, arguing that because of the differences in each petitioner's role in the particular arrests, there was no single conspiracy and that each allegedly illegal arrest must have been the product of a separate agreement (*id.* at A17-A18).

In addition, the court noted that defense counsel had acknowledged this to be a complex case that is likely to turn on circumstantial evidence relating to each petitioner's state of mind and that petitioners recognized that oral statements made by them will be essential to prove the requisite state of mind of each. Accordingly, the court reasoned, "[t]he potential for conflict here is overwhelming since joint counsel's obligation to preserve the confidences of one defendant could severely hamper the cross-examination of any hearsay witness as to another defendant" (Pet. App. A18).

The court found, however, that "[t]he most glaring evidence of the potential for conflict which may arise if all defendants are represented jointly is found in defendants Keweshan, Landis and McNamee's motion for severance, and the accompanying memorandum of law" (Pet. App. A18). There, the court noted, these three petitioners had argued that they would be "severely prejudiced" if they were tried together with petitioner Flanagan (*id.* at A19). In support of this motion, they argued that their participation was predicated on receipt of the prearranged signal from Flanagan, the decoy; that from their places of hiding they were not knowledgeable of the details of what occurred

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[2]Petitioners Flanagan and McNamee were charged in all 13 counts, Landis in 11 counts, and Keweshan in 10 counts (Pet. App. A12-A13).

between Flanagan and those who robbed him; that each of the overt acts and acts in the substantive counts relating to them individually was, standing alone, legal and required by the circumstances; that "the vast majority of the Government's evidence will be related to what transpired between [petitioner] Flanagan and the various individuals who robbed him"; and that the government's case will therefore "be dependent on facts and circumstances of which they have little or no knowledge" (Pet. App. A19 n.2).[3]

The district court concluded on the basis of testimony at the hearing that each petitioner was fully aware of the potential conflicts and that each, without financial pressure, had voluntarily and intelligently chosen to waive any objection to the conflict of interest and elected to be represented by the same counsel (Pet. App. A16). However, the court expressed "grave concern" that a conflict of interest was very likely to arise (Pet. App A25), and concluded that it had the authority to require separate counsel under these circumstances notwithstanding petitioners' waiver of their right to separate counsel.

The court noted that the ethical standards of the legal profession prohibit multiple representation unless it is "obvious" or "clear" that the lawyer can adequately represent the interests of each client, even if each consents to such

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[3]The district court also discussed other ways in which a conflict of interest could manifest itself in the case, as summarized by defense counsel himself: (1) the inability of counsel to set one defendant apart from the others during opening and closing statements; (2) the inability of counsel to argue the relative culpability of the defendants at sentencing; (3) the possibility of an offer of immunity to one of the defendants; (4) the likelihood that the government would introduce more evidence against petitioner Flanagan, perhaps leading the jury to infer guilt of the others or causing defense efforts to concentrate on Flanagan; and (5) problems arising if some but not all of the petitioners chose to testify or if character or reputation evidence was offered on behalf of some but not all petitioners (Pet. App. A14-A15).

representation (Pet. App. A23-A24, A26, quoting Model *Code of Professional Responsibility*, DR 5-105 (1980), and *Standards Relating to the Prosecution and the Defense Function* § 3.5 (Approved draft 1971)). The district court stressed as well that an attorney's representation of conflicting interests "invites disrespect for the integrity of the court" and is "detrimental to the independent interest of the trial judge to be free from future attacks over the adequacy of the waiver or the fairness of the proceedings in his own court" (*id.* at A24, quoting *United States* v. *Dolan*, 570 F.2d 1177, 1184 (3d Cir. 1978)). Finally, the court rejected petitioners' argument that disqualification would be appropriate only upon a showing of an "actual" conflict of interest, observing that, under Fed. R. Crim. P. 44(c), it was required to take appropriate action in advance of trial based on the likelihood that an actual conflict would develop (Pet. App. A25). The court agreed that disqualification of a defendant's chosen counsel would be inappropriate if the potential for a conflict of interest were "mere speculation," but concluded that "where the likelihood is great that a potential conflict will escalate into an actual conflict," it had the discretion to anticipate the conflict and disqualify defense counsel (Pet. App. A27).

3. The court of appeals affirmed the district court's order, finding no abuse of discretion in the disqualification of the law firm (Pet. App. A1-A11). The court noted in this regard that petitioner did not dispute the district court's finding that the conflicts of interest it identified were very likely to arise (*id.* at A10; see also *id.* at A6).

In affirming the district court's order, the court reasoned that although the Sixth Amendment and the Due Process Clause do provide some protection for a defendant's decision to select a particular attorney, "that protection goes no further than preventing arbitrary dismissal of the chosen attorney, and providing a fair opportunity to secure counsel

of his choice" (*id.* at A8). The court of appeals therefore held that a court may order the disqualification of counsel in conformity with the ethical standards of the bar even over the defendant's objections. In the court's view, although a knowing and intelligent waiver accepted by the court will insulate a conviction from later attack, "[i]t does not follow * * * that because defendants may waive their right to separate representation free from potential conflicts, they have an absolute right, constitutional or otherwise, to have such waivers accepted by a court" (*id.* at A9).

The court of appeals stressed that a defendant's choice of counsel is not to be dealt with lightly or arbitrarily or interfered with where potential conflicts of interest are speculative. But where materialization of a conflict is very likely, the court held that disqualification of joint counsel and the ordering of separate counsel is one of the appropriate measures a district court may take under Fed. R. Crim. P. 44(c) when it is unable to conclude that a conflict of interest is not likely to result from joint representation.[4] "Once each defendant has consulted with his own counsel," the court explained, "a truly independent decision may then be made whether or not to continue with a common defense strategy in light of the hazards that such a strategy may entail" (Pet. App. A10; footnote omitted).

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[4]The court also rejected petitioners' contention that even if joint representation is inappropriate in this case, the law firm should not have been disqualified from representing any of the petitioners. In the court's view, the potential for a conflict of interest arising from the firm's receipt of confidential information from all defendants was obvious. Thus, the court concluded that although complete disqualification may not be required in every case where a conflict of interest is likely to arise, that is one measure committed to the discretion of the trial court under Fed. R. Crim. P. 44(c), and there was no abuse of discretion here (Pet. App. A11).

The court of appeals stayed its mandate to and including September 19, 1982, to permit the filing of a petition for a writ of certiorari, and we have been informed by the United States Attorney that a trial date has not yet been set, apparently pending the Court's disposition of the petition.

## DISCUSSION

Petitioners contend that, notwithstanding the district court's explicit and supported finding that the law firm representing them is very likely to be confronted with a conflict of interest at trial, the Constitution prohibited the district court from disqualifying the law firm in the exercise of its authority to supervise the conduct of attorneys appearing before it. This contention is in error. The Constitution does not afford the accused in a criminal prosecution the right to insist upon being represented by a lawyer whose appearance in the case would violate the established ethical standards of the legal profession, jeopardize the integrity of the criminal justice system, and undermine the public's confidence in that integrity. Nor would the result petitioners urge further the purposes of the Sixth Amendment of assuring that the accused has the assistance of counsel whose efforts will be devoted entirely to his interests, unhinderd by divided loyalties.

Nevertheless, because, as petitioners point out (Pet. 12-18), the decisions of several other courts of appeals conflict with that of the Third Circuit in this case regarding the authority of a trial court to disqualify counsel in these circumstances, we do not oppose the grant of the instant petition for a writ of certiorari.

1. A threshold question that will apparently require decision if the Court grants the petition in this case is whether the court of appeals had jurisdiction under 28 U.S.C. 1291 of petitioners' pretrial appeal of the order disqualifying

counsel. The question of the appealability of orders granting disqualification was reserved by this Court in *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 372 n.8 (1981).

The court of appeals in this case held (Pet. App. A5 n. 1) that it did have jurisdiction. Several other courts of appeals have reached the same conclusion, in criminal cases, without extended discussion of the issues. See, e.g., *United States* v. *Cunningham*, 672 F.2d 1064, 1066 n.1 (2d Cir. 1982); *United States* v. *Agosto*, 675 F.2d 965, 968 n.1 (8th Cir.), cert. denied after remand and subsequent affirmance sub nom. *Gustafson* v. *United States*, No. 81-2270 (Oct. 4, 1982); *United States* v. *Hobson*, 672 F.2d 825, 826 (11th Cir.), cert. denied, No. 82-57 (Oct. 12 1982); see also *United States* v. *Smith*, 653 F.2d 126 (4th Cir. 1981) (pretrial appeal entertained; question of appealability not discussed). The Ninth Circuit has reached the opposite conclusion. See *United States* v. *Greger*, 657 F.2d 1109 (1981), petition for cert. pending, No. 81-1357.

As we explain in our Brief in Opposition (at 10-14) to the certiorari petition in *Greger*,[5] there is a substantial question whether such an order satisfies the criteria of a collateral order appealable under the doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and its progeny. See *Nixon* v. *Fitzgerald*, No. 79-1739 (June 24, 1982), slip op. 9-11. The circuit conflict on this issue independently warrants review by this Court. Because the trial in *Greger* was not stayed and already has been completed, this is a more appropriate case than *Greger* for consideration of the jurisdictional issue.

2. The principal thrust of petitioners' position on the merits of the disqualification issue is that they have a constitutional right to counsel of their choice that overrides the

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[5]We are furnishing counsel for petitioner with a copy of the Brief for the United States in Opposition in *Greger*.

authority of the district court to supervise the ethical conduct of attorneys appearing before it. They argue, in other words, that they have a constitutional right to waive their Sixth Amendment right to the effective assistance of counsel who is not burdened with a conflict of interest and that such a waiver is binding upon the courts. See Pet. 12-14, 18, 20-22. This contention misapprehends both the nature of the Sixth Amendment right to the assistance of counsel and the ability to waive that right.

a. As the court of appeals correctly oberved (Pet. App. A8), the Constitution does not afford absolute protection to a defendant's selection of a particular attorney to represent him; the constitutional protection "goes no further than preventing arbitrary dismissal of the chosen attorney, and providing a fair opportunity to secure counsel of his choice" (*ibid.*). This is clear from *Powell* v. *Alabama*, 287 U.S. 45 (1932), where the Court stated that if "a state or federal court were *arbitrarily* to refuse to hear a party by counsel, employed by and appearing for him," such a refusal "would be a denial of a hearing, and, therefore, of due process in the constitutional sense" (287 U.S. at 69; emphasis added). The Court did state that a defendant must be afforded a "fair opportunity" to secure counsel of his choice (*id.* at 53), but it did not suggest that the defendant has an absolute right to be represented by counsel of his choice.

The district court's disqualification of the law firm in this case plainly did not violate these principles. That court did not "arbitrarily" deprive petitioners of the assistance of counsel of their choice. The court rested its order of disqualification on the substantial countervailing public interest in ensuring the integrity of the bar and the administration of criminal justice that is served by preventing conflicts of interest in the representation of defendants in criminal trials. That interest finds expression in well established rules of the legal profession, which are in turn incorporated in the

local rules of the district court.[6] As the district court observed (Pet. App. A23-A24, A26), DR 5-105(C) of the *Model Code of Professional Responsibility* (1980) provides that a lawyer may not represent more than one client in a matter unless all consent and it is "obvious that he can adequately represent the interests of each." Similarly, § 3.5(b) of the *Standards Relating to the Prosecution Function and the Defense Function* (App. Draft 1971) states that "[t]he potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation." Thus, as this Court observed in *Cuyler* v. *Sullivan*, 446 U.S. 335, 346 (1980), citing DR 5-105 and Standard 3.5(b), "[d]efense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial."

The district court's finding — which was affirmed by the court of appeals (Pet. App. A10) and is not challenged by petitioners herein — that a conflict of interest would be "very likely" to arise if petitioners were represented by the same law firm, establishes that even though petitioners have consented to the joint representation, the attorneys in that firm would violate the provisions of DR 5-105 and Standard 3.5 if they represented petitioners in this case. Accordingly, the district court's application of well recognized ethical standards of the bar in disqualifying the law firm from representing petitioners cannot be thought to have

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[6]E.D. Pa. R. 7 provides: "The canons of ethics of the American Bar Association as now existing shall be and as hereafter modified shall become standards of conduct for attorneys of this Court."

arbitrarily interfered with petitioners' selection of counsel of their choice. Moreover, it cannot seriously be contended that elimination of the disqualified law firm from the pool of available counsel deprives petitioners of a constitutionally sufficient "fair opportunity to secure counsel of [their] own choice" (*Powell* v. *Alabama, supra,* 287 U.S. at 53) from among those who remain.

b. Petitioners also err in contending (Pet. 12-14, 21-22) that they have a constitutional right to waive their Sixth Amendment right to the assistance of conflict-free counsel and to be represented instead by an attorney who will be likely to be faced with a conflict of interest at trial. We may assume that petitioners' knowing and intelligent waivers of their Sixth Amendment right to the effective assistance of counsel in the face of a potential conflict of interest would insulate any ensuing conviction from later attack. But as the court of appeals observed, "[i]t does not follow * * * [that] they have an absolute right, constitutional or otherwise, to have such waivers accepted by a court" (Pet. App. A9). As this Court has stated, "[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right." *Faretta* v. *California,* 422 U.S. 806, 819 n.15 (1975), quoting *Singer* v. *United States,* 380 U.S. 24, 34-35 (1965). Applying that principle here, the ability of a defendant to waive his right to be represented by conflict-free counsel does not imply a right to insist upon the opposite of that right: representation by an attorney who has a conflict of interest.

3. Although, for the reasons given above, the decision of the court of appeals on the merits of the disqualification issue is correct, we do not oppose the grant of the petition in this case. As petitioners point out, the Second Circuit has recently held, in conflict with the decision below, that defendants who are to be jointly tried have a constitutional right to be represented by counsel who has a conflict of

interest, even where counsel's appearance in the case would violate the ethical standards of the bar. *United States* v. *Curcio*, 680 F.2d 881, 885-888 & n.3 (1982). In reaching this conclusion, however, the Second Circuit acknowledged its "serious misgivings" about the practice (680 F.2d at 886) and its "uneasiness about sanctioning the joint representation of criminal defendants" because of the "considerable dangers" of prejudical conflict of interest that are "both ubiquitous and insidious" (*id.* at 887). See also *United States* v. *Armedo-Sarmiento*, 524 F.2d 591 (2d Cir. 1975); cf. *United States* v. *Cunningham*, *supra*. The Fifth Circuit likewise has recognized a right of defendants to insist upon joint representation in such circumstances, *United States* v. *Garcia*, 517 F.2d 272 (1975), and the Eighth Circuit's decision in *United States* v. *Agosto*, *supra*, 675 F.2d at 973-974, likewise can be read to lend some support to this proposition. The Third Circuit in this case itself acknowledged (Pet. App. A9 n.5) that its holding conflicted with that of the Second and Fifth Circuits in *Armedo-Sarmiento* and *Garcia*, respectively.

In addition, the issue presented is one of substantial and recurring importance in the administration of criminal justice in the federal courts, and it may be expected to arise even more frequently now that district courts are required by Fed. R. Crim. P. 44(c) to conduct an inquiry in all cases of joint representation and to take "appropriate" measures if ~~it is~~ unable to conclude that no conflict of interest is likely to arise. Because of the conflict in the circuits, and especially in view of the threat to the integrity of the bar and the administration of criminal justice occasioned by joint representation in cases involving a serious potential for a conflict of interest, review by this Court is required in order to offer guidance on the question whether the Constitution nevertheless requires a trial court to permit joint representation in such circumstances.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1982

DOJ-1982-11